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SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GREG O. SHULL,

Plaintiff,

vs.

OCWEN LOAN SERVICING, LLC
dba T.D. SERVICES COMPANY, and
DOES 1-100, inclusive,

Defendants.

CASE NO. 13-CV-2999-BEN (WVG)

**ORDER GRANTING MOTION TO
DISMISS**

[Docket No. 3]

Before this Court is the Motion to Dismiss filed by Defendant Ocwen Loan Servicing, LLC (Ocwen). (Docket No. 3). For the reasons stated below, the Motion is **GRANTED**.

BACKGROUND

In October 2006, Plaintiff Gregory O. Shull obtained a mortgage loan from First Guaranty Financial Corporation, and executed a promissory note secured by a deed of trust. (Deed of Trust, Docket No. 3-4).¹ Plaintiff defaulted upon his loan, and a notice of default was recorded on December 18, 2012. (Notice of Default, Docket No. 3-5). The beneficial interest in the Deed of Trust was assigned to Deutsche Bank National Trust Company, in its role as a trustee of a trust containing mortgage-backed assets. (*See id.* at 2). Plaintiff did not cure the default, and a notice of trustee's sale was

¹Ocwen's unopposed Request for Judicial Notice is **GRANTED**. (Docket No. 3-2).

1 recorded on June 5, 2013. (Notice of Trustee's Sale, Docket No. 3-6). The foreclosure
 2 sale of the property does not appear to have proceeded.

3 Plaintiff alleges that the Deed of Trust was executed in favor of First Guaranty
 4 Financial Corporation (First Guaranty), an alleged predecessor of Ocwen. (FAC ¶ 22).
 5 Commonwealth Land Title Company was listed as the trustee, and Mortgage Electronic
 6 Registration System (MERS) was named the "nominee of the lender" and the
 7 "beneficiary." (*Id.* ¶ 23; Deed of Trust, at 1).

8 Plaintiff filed a First Amended Complaint (FAC) against Ocwen, MERS, and
 9 T.D. Services Company, a wholly owned subsidiary of Ocwen (collectively,
 10 "Defendants"). (*Id.* ¶¶ 3-5). Plaintiff's claims for relief are founded upon the
 11 allegation that Defendants are "strangers" to the Deed of Trust, and have no ownership
 12 interest that entitles them to collect payment, declare a default, or conduct a trustee's
 13 sale. (*Id.* at 3).

14 Plaintiff alleges that on or around the time of the origination, First Guaranty sold
 15 the debt obligation to an unknown entity. (*Id.* ¶ 24). He contends that the Note and
 16 Deed of Trust were never validly assigned to any defendant. (E.g., *id.* ¶¶ 15-16).
 17 Plaintiff contends that no defendant can demonstrate that the Note was ever properly
 18 endorsed and transferred to a defendant. (*Id.* ¶ 25). Plaintiff claims that no defendant
 19 has provided any evidence to verify the owner and amount of the mortgage, or validate
 20 the claim to the debt obligation. (*Id.*) Plaintiff also contends that Ocwen failed to
 21 follow the legal requirements for transferring a negotiable interest and did not properly
 22 securitize his loan. (*Id.* ¶¶ 26-28).

23 Plaintiff admits that he owes money on his mortgage obligation. (*Id.* ¶ 20). He
 24 claims to dispute the amount owed, and asks this Court to determine who holds the
 25 Note and Deed of Trust, and to determine the rights of Defendants. (*Id.*) Plaintiff
 26 claims he has been damaged because multiple parties may seek to enforce the debt, title
 27 to his home has been clouded, and he has been paying the wrong party. (*Id.* ¶ 30).

28 Plaintiff challenges the role of MERS in the securitization and the effect on

1 chain of title. He contends that MERS could not, and did not, properly authorize the
 2 assignments and substitutions of the Deed of Trust to Defendants. (*Id.* ¶¶ 34, 36, 40,
 3 46-47, 52, 55, 75). He further contends that even if the assignment and substitution of
 4 the Deed of Trust was authorized, it would result in the splitting of the Note and Deed
 5 of Trust, rendering the Deed of Trust unenforceable. (*Id.* ¶¶ 39, 71).

6 The FAC asserted: (1) declaratory relief pursuant to 28 U.S.C. §§ 2201, 2202;
 7 (2) negligence; (3) quasi contract; (4) violation of 15 U.S.C. §§ 1692 *et seq.*; (5)
 8 violation of the California Business and Professions Code § 17200²; (6) accounting;
 9 and (7) extortion pursuant to 18 U.S.C. § 1951(b)(2). The Court notes that there is
 10 some inconsistency in the causes of action asserted. The title page lists ten causes of
 11 action, many of which differ from the causes of action actually asserted in Plaintiff's
 12 FAC. This Court will address only the seven causes of action asserted in the FAC.

13 **LEGAL STANDARD**

14 Under Federal Rule of Civil Procedure 12(b)(6), a district court may grant a
 15 motion to dismiss if, taking all factual allegations as true, the complaint fails to state
 16 a plausible claim for relief on its face. FED. R. CIV. P. 12(b)(6); *Bell Atl. Corp. v.*
 17 *Twombly*, 550 U.S. 544, 556-57 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678
 18 (2009) (requiring plaintiff to plead factual content that provides "more than a sheer
 19 possibility that a defendant has acted unlawfully"). Under this standard, dismissal is
 20 appropriate if the complaint fails to state enough facts to raise a reasonable expectation
 21 that discovery will reveal evidence of the matter complained of, or if the complaint
 22 lacks a cognizable legal theory under which relief may be granted. *Twombly*, 550 U.S.
 23 at 556.

24 **DISCUSSION**

25 A. Abandonment

26 Plaintiff asserted seven causes of action in his FAC. Ocwen asks this Court to

28 ²Although not separately titled, the table of contents lists this cause of action, and
 it is clearly alleged in the FAC. (FAC ¶¶ 140-50).

1 dismiss all causes of action.

2 In his Opposition to the Motion, Plaintiff disputes the application of the tender
 3 requirement and specifically defends his claims for declaratory relief and extortion. He
 4 also argues that he has standing to prosecute his complaint and denies that he is
 5 estopped from prosecuting the complaint because of his bankruptcy case. (Opp'n at
 6 8-10). However, review of the Opposition reveals that Plaintiff does not dispute
 7 Defendants' specific arguments with regard to his claims for negligence, quasi contract,
 8 violation of 15 U.S.C. § 1692, and accounting.

9 Accordingly, this Court **GRANTS** the motion to dismiss as to claims two, three,
 10 four, and six. By failing to respond to the arguments raised by Defendant on these
 11 claims, Plaintiff failed to oppose the motion to dismiss these claims. Where a party
 12 fails to address arguments against a claim raised in a motion to dismiss, the claims are
 13 abandoned and dismissal is appropriate. *See, e.g., Silva v. U.S. Bancorp*, No. 5:10-cv-
 14 1854, 2011 WL 7096576, at *3 (C.D. Cal. Oct. 6, 2011) ("[T]he Court finds that
 15 Plaintiff concedes his . . . claim should be dismissed by failing to address Defendants'
 16 arguments in his Opposition.") (citations omitted); *Qureshi v. Countrywide Home*
 17 *Loans, Inc.*, No. 09-4198, 2010 WL 841669, at *9 & n.2 (N.D. Cal. Mar. 10, 2010)
 18 (citing *Jenkins v. County of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005))
 19 (dismissing claims as abandoned where the plaintiff did not oppose dismissal); *In re*
 20 *TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1131 (N.D. Cal. 2008)
 21 (dismissing a claim without leave to amend where the plaintiff did not address the
 22 defendant's arguments); *see also Walsh v. Nev. Dep't of Human Res.*, 471 F.3d 1033,
 23 1037 (9th Cir. 2006) (where opposition to motion to dismiss failed to address
 24 arguments in motion to dismiss, the plaintiff failed to demonstrate a continuing interest
 25 in pursuing a claim for relief and it was "effectively abandoned" and could not be
 26 raised on appeal).

27 The Court notes that the Plaintiff added some general language regarding
 28 liberality of amendment, but never explicitly suggests to this Court that he might be

1 able to amend the four claims. It is unclear whether Plaintiff was seeking permission
 2 to amend the claims which he did not defend because he conceded Defendant's
 3 arguments about the claims as pled. Accordingly, the abandoned claims will be
 4 **DISMISSED WITHOUT PREJUDICE** and Plaintiff will be given leave to amend.

5 However, the Court reminds Plaintiff that because Plaintiff failed to oppose
 6 Defendant's arguments, despite having a clear opportunity to do so, Plaintiff cannot
 7 simply re-allege the same claims in an amended complaint. Any amended complaint
 8 must address the arguments which Defendant raised and which Plaintiff has apparently
 9 conceded. Plaintiff will not be permitted to raise arguments in defense of an amended
 10 complaint which Plaintiff could have, but failed to properly raise in defense of the
 11 original complaint.

12 **B. Declaratory Relief**

13 Plaintiff's first cause of action seeks declaratory relief pursuant to the
 14 Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. Plaintiff's claim for declaratory
 15 relief is deficient because Plaintiff failed to plead sufficient facts showing a plausible
 16 claim for relief. Plaintiff asks that this Court determine the rights and obligations of
 17 the parties relative to the property. (Opp'n at 11). He alleges that Defendants are not
 18 his creditors and do not have a secured interest in the property. (*Id.* at 13; FAC ¶¶ 115-
 19 18). His claim for declaratory relief is premised on his belief that Defendants lack the
 20 authority to collect payments and foreclose upon his home. However, careful review
 21 of Plaintiff's complaint and the briefing in this matter reveals that Plaintiff has not
 22 alleged sufficient facts from which this Court could conclude that there is more than
 23 a "sheer possibility" that Defendants lacked authority to foreclose.

24 California law does not permit a plaintiff to bring a lawsuit to require a
 25 foreclosing party to prove that it has the right to foreclose without a basis for doing so.
 26 California's non-judicial foreclosure scheme is a comprehensive and exhaustive
 27 framework. *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 1154
 28 (4th Dist. 2011). Because of the exhaustive nature of the scheme, California appellate

1 court have refused to read additional requirements into the non-judicial foreclosure
 2 statutes. *Id.* (citation omitted). A party cannot bring a legal challenge to an entity's
 3 authority to initiate a foreclosure where there is no "specific factual basis" for alleging
 4 that a foreclosure was not initiated by the correct party. *See id.* at 1155-56. "No case
 5 law or statute authorizes such a speculative suit." *Id.*

6 Plaintiff makes conclusory allegations that Defendants lack the authority to
 7 collect payments and foreclose upon his property, but he fails to provide factual
 8 allegations to support his claims. Although he alleges that the Note and Deed of Trust
 9 were never properly transferred or assigned to a defendant, he asserts no specific facts
 10 to suggest that his allegation is anything but speculation or an effort to test Ocwen's
 11 authority. He presents no specific facts which, accepted as true, would show that there
 12 was a failed effort to securitize the loan, or that the loan was transferred to a third party.
 13 He alleges no specific facts indicating fraud or any other problem with any assignment
 14 which he has standing to challenge. In sum, Plaintiff does not allege specific facts
 15 from which this Court might infer that discovery will reveal evidence that Defendant
 16 lacks the authority to foreclose upon Plaintiff's property.

17 In the course of his lengthy complaint, Plaintiff raised other potential challenges
 18 to Defendants' authority, all of which must fail. California's non-judicial foreclosure
 19 statute does not require the foreclosing party to be in possession of the note. *Farner*
 20 v. *Countrywide Home Loans*, 08-cv-2193, 2009 WL 189025 at *2 (S.D. Cal. Jan. 26,
 21 2009); CAL. CIV. CODE §§ 2924 *et seq.* Where the deed of trust provides for MERS to
 22 act as beneficiary with the right to foreclose and the ability to transfer that right, courts
 23 have rejected the argument that MERS cannot assign the deed of trust. *Sargent v.*
 24 *JPMorgan Chase Bank, N.A.*, No. 13-1690, 2013 WL 3878167, at *2 (N.D. Cal. July
 25 2013); *Calvo v. HSBC Bank USA, N.A.*, 199 Cal. App. 4th 118, 125 (2d Dist. 2011);
 26 *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 270-71 (1st. Dist. 2011)
 27 (MERS does not bear burden of proving validity of assignment of a note and does not
 28 lack authority to assign a note because it lacks interest in the note). The Deed of Trust

1 in this case authorizes MERS to foreclose or act for the lender. (Deed of Trust at 2-3).
 2 Plaintiff also cannot bring a claim based on the contention that the assignment
 3 impermissibly separates the note and the deed of trust, rendering the deed of trust
 4 unenforceable. *See Sargent*, 2013 WL 3878167, at *2 (rejecting claim where plaintiff
 5 did not make clear how note and deed of trust were irreparably split, or why MERS was
 6 not acting as agent of the lender).

7 As Plaintiff has not alleged specific facts from which this Court might infer that
 8 no defendant has authority to foreclose, Plaintiff has not sufficiently pled his claim for
 9 declaratory relief. The first cause of action is therefore **DISMISSED WITHOUT**
 10 **PREJUDICE**. Plaintiff is given leave to amend, but is cautioned that any amendment
 11 must allege specific additional facts sufficient to allow this Court to infer that no
 12 defendant had authority to foreclose.

13 **C. Extortion**

14 Plaintiff also seeks relief for Ocwen' alleged acts of extortion. His cause of
 15 action cites to 18 U.S.C. § 1951(b)(2), which makes extortion a criminal offense under
 16 federal law. As a general rule, there is no private cause of action for extortion, which
 17 is a criminal offense under state and federal law. *See Arista Records v. Sanchez*,
 18 CV507046, 2006 WL 5908359, at *2 (C.D. Cal. Mar. 1, 2006).

19 In his Opposition, Plaintiff cites to cases where courts have allowed a cause of
 20 action for "civil extortion." (Opp'n at 12-13). Plaintiff concedes that, to the extent a
 21 civil claim is recognized, "it is based on the same elements as criminal extortion." (*Id.*
 22 at 12 (quoting *Levitt v. Yelp! Inc.*, CV-10-2321, 2011 U.S. Dist. LEXIS 124082, at *5
 23 (N.D. Cal. Oct. 26, 2011))). Extortion is the "obtaining of property from another, with
 24 his consent, induced by a wrongful use of actual or threatened force, violence, or fear,
 25 or under color of official right." 18 U.S.C. § 1951(b)(2). Even if Plaintiff were correct
 26 in arguing that civil extortion is a colorable cause of action, he has not pleaded facts
 27 to show that the elements can be fulfilled.

28 Plaintiff alleges that Ocwen committed extortion by demanding payment through

1 a false claim of ownership and false assertion of the right to collect payments. (FAC
 2 ¶¶ 156-57). Plaintiff asserts that Defendants demanded and received money based on
 3 a “purported debtor-creditor relationship that did not and does not exist under an
 4 immediate threat of loss of possession and title of Property, and physical eviction from
 5 Property.” (Opp’n at 12). He argues that the money paid to Defendants was paid
 6 “under the threat of non-judicial foreclosure.” (*Id.*) He contends in his Opposition that
 7 he reasonably fears that he will be forcibly removed from the property, along with his
 8 family and elderly grandmother. (*Id.*)

9 Plaintiff’s extortion claims hinge upon his contention that no defendant had
 10 authority to demand payments or foreclose upon his home. As discussed above,
 11 Plaintiff has not alleged sufficient facts from which this Court could infer that
 12 Defendants lack such authority and have made wrongful threats. *See also Das v. Bank*
 13 *of Am. N.A.*, 186 Cal. App. 4th 727, 740-41 (2010) (not tortious to foreclose on
 14 collateral when a debt is not paid). Plaintiff’s seventh cause of action must therefore
 15 be **DISMISSED WITHOUT PREJUDICE**. Plaintiff is given leave to amend.

16 **D. California Business & Professions Code § 17200**

17 Ocwen did not raise specific arguments in its Motion regarding Plaintiff’s
 18 allegations that Defendants violated California’s Unfair Competition Law (UCL), CAL.
 19 BUS. & PROF. CODE §§ 17200 *et seq.*, but clearly indicated that it sought dismissal on
 20 the basis of the other arguments in its motion.

21 The UCL prohibits unfair competition, which includes “any unlawful, unfair or
 22 fraudulent business act or practice.” CAL. BUS. & PROF. CODE § 17200. Careful
 23 examination of the allegations in the FAC indicates that Plaintiff has not sufficiently
 24 stated a claim. Plaintiff’s claim is premised upon his allegations that Defendants lack
 25 authority to seek payments and foreclose upon his home. (FAC ¶¶ 140-50). As
 26 discussed above, Plaintiff has failed to allege sufficient facts from which this Court
 27 could infer that Defendants could lack such authority. As such, the fifth cause of action
 28 is **DISMISSED WITHOUT PREJUDICE**. Plaintiff is given leave to amend.

CONCLUSION

Based on the foregoing, Ocwen's Motion to Dismiss is **GRANTED**. The Complaint is **DISMISSED WITHOUT PREJUDICE**. If Plaintiff wishes to file a Second Amended Complaint, he must do so no later than 28 days after the date this Order is filed.

IT IS SO ORDERED.

Dated: April 10, 2014

~~HON. ROGER T. BENITEZ~~
United States District Judge